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No. 01-470

In The

Supreme Court of the United States

JENNIS P. ("KAY") HARNISH,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Pursuant to Supreme Court Rule 10, has Petitioner established "compelling reasons" for the writ?

II. Did the Lower Courts correctly hold that Petitioner's claims based on events occurring on or before October 4, 1995, are barred by limitations?

III. Did the Lower Courts correctly rule that an alleged off-premises, off-duty assault that is not employment related cannot be the basis for a Title VII harassment claim against an employer?

IV. Did the Lower Courts correctly rule that, as to claims not time barred, Harnish did not establish a *prima facie* case of hostile work environment sexual harassment?

V. Did the Lower Courts correctly rule that misrepresentations, mischaracterizations, ulterior motive and an off-premises, off-duty conduct not employment related do not qualify as protected conduct under Title VII's opposition clause?

VI. Assuming *arguendo* that Harnish established a *prima facie* case of retaliation, then did she establish sufficient evidence of pretext to avoid summary judgment?

CORPORATE DISCLOSURE STATEMENT

Respondent American Airlines, Inc. is a subsidiary of AMR Corporation, a publicly held company. No publicly held company owns 10% or more of the stock of AMR Corp.

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COUNTER STATEMENT OF THE CASE

Contrary to pp. 22 and 24 of the Petition, the lower courts did not make credibility determinations or take sides. Rather, the lower courts relied on Harnish's own deposition testimony admitting misrepresentations, mischaracterizations, ulterior motive, and material omissions. These matters are hereinafter explicated and corrected.

I. Background and Relevant Organizational Structure.

From July 1990 to January 1995, Jennis Harnish (hereinafter "Harnish") was a level 3 manager at American Airlines, Inc.'s ("AA") Admiral's Club in San Diego, California. (R2432). In January 1995, Harnish applied for and received a lateral transfer to the Dallas/Fort Worth International Airport ("DFW"). (R2850).

At DFW, Harnish was a level 3 supervisor (a/k/a Customer Services Team Leader) in the Ramp Services department. (R2438). She was one of 40 to 45 supervisors. (R4260). A level 3 supervisor reported to a level 5 shift manager. There were nine or ten shift managers. (R4601). Shift managers reported to Mark Mitchell, Manager of Ramp Services. (R4601). Mitchell reported to William Wallace, Vice President at DFW Airport. (R4484). In turn, Wallace reported to Don O'Hare, Senior Vice President. (R4605).

II. Harnish's Awareness of the Nature of the Alleged Sexual Harassment That Had Discontinued by the End of September 1995.

Harnish claims that from January 1995 through September 1995, three men sexually harassed her or took actions based on her gender. First, Harnish claims that, between March 1995 and September 1995, Wilkshire embraced her once, called her "skirt," and branded her a

troublemaker. (R2496, 2366, and 2591-92). The last such act was in September 1995. (*Id.*).

Second, Harnish claims that McKanna indicated he would show her favoritism if she went out with him. (R2459). The last such act ended June 1995. (R2459).

Third, Harnish asserts that, prior to September 19, 1995, her subordinate employee, Mark Bowers, touched her, made lewd jokes, showed her a computer entry containing the phrase "crotch rash," and said he would comply with her instruction if she kissed him. (R2312-14). After September 27, 1995, Bowers did nothing of a sexual nature towards Harnish. (R2473-74).

Prior to October 4, 1995, Harnish believed the aforegoing acts of Wilkshire, McKanna, and Bowers were sexual harassment. (R2590-93; 2463-64; 2453-55; 2647; 2465-66; 2590; 2313). In early August 1995, Harnish spoke with Cathy Fragnoli, a friend who is an attorney. Harnish asserted she was being sexually harassed and requested a referral to an attorney. Fragnoli referred Harnish to an attorney named Mallory. (R2578-79; 2593). Harnish obtained legal advice from Mallory. (R2593). In September 1995, she complained in writing to AA about Bowers and met with representatives of AA's Human Resources Department. (R2469-70; 2647). Subsequently, Bowers was disciplined. (R2697).

III. According to Harnish's Deposition Testimony, the Alleged December 3, 1995 Sexual Assault was not Employment Related.

On December 3, 1995, Harnish got off work early afternoon and went back to her house and spoke with her parents, who were visiting from Oklahoma. (R2540-41). While at home, Harnish called Cathy Thompson's house where mutual friends from San Diego, Becky Rogstad and Bob Majors, were visiting. (R2536; 2541-42). Majors and Rogstad had traveled to Dallas-Fort Worth for entirely

social reasons. (R2537) Both had spent the night of December 2, 1995, at Thompson's house. (R2538-39). There was an interest between Rogstad and McKanna. In speaking with Harnish, Rogstad stated that she had spoken with McKanna and he wanted "her to meet him at a restaurant in Arlington called the Scoreboard." (R2542). At Rogstad's request, Harnish agreed to go to Scoreboards. (R2542). Harnish then drew a map to show her parents how to get to the Scoreboard and drove separately to Thompson's house to pick up Rogstad and Majors. (R2542-44).

Harnish and her friends arrived at the Scoreboard Sports Bar at about 3:00 p.m. and stayed until 7:00 or 7:30 p.m. (R2524-25). When they arrived, Harnish's parents were already there. (R2545). While at the Scoreboard, Harnish consumed alcohol. (R2546).

After leaving the Scoreboard, some of the group continued on to Hill's house to party. (R2547-48). After speaking to Rogstad, Harnish decided to go to Hill's house. (R2527). Harnish went to be with her friend, Rogstad. (R2527).

Harnish and her friends arrived at Hill's house at 7:00 or 7:30 p.m. (R2528). Harnish consumed additional alcohol. (R2529). Eventually, Rogstad suggested leaving to go country and western dancing, and Hill suggested that they go to Cowboys. (R2551). AA was not responsible for Harnish's visit to Cowboys. (R2529).

Harnish drove her car to Cowboys, and Majors, Rogstad, Hill, and Deidre Souter were passengers. (R2552). When the group arrived, everyone went to the bar and ordered still additional alcohol. (R2552-53). Upon returning from the restroom, Harnish had some difficulty locating her friends. (R2556). Harnish got into a disagreement with the bouncer and was told that she had to leave the bar. (R2557). The bouncer told Harnish that he

thought she had had too much to drink. (R2559). Eventually Rogstad found Harnish who was "crying and was very upset." (R2835-36). Rogstad states that on a scale of 1 to 10 with 10 being sobbing with shoulders heaving and gasping for breath, Harnish was "probably right close to 10." (R2837-38).

The group then left, and Majors drove back to Hill's house. (R2839). En route Harnish asked Hill "do you just want a blow job or what?" (R2562). No one else in the group had used the phrase "blow job" that evening. (R2562). Harnish admits she leaned into the back seat from the front passenger seat "and he and I unzipped his pants and I pretended to act like I was going to pull his penis out in front of everybody." (R2737). Hill and Harnish dispute whether she performed oral sex on him. (*Id.* and 2816).

The group arrived back at Hill's house at 10:15 to 10:45 p.m. Rather than drop off the passengers and go to her home, Harnish decided to re-visit Hill's house because she "didn't think it was responsible to leave people." (R2622-23). Harnish alleges that while she was in the bathroom at Hill's house, Hill approached her and began kissing her. (R2566-67). Harnish returned his kisses. (R2568). Harnish has admitted in writing that, before intercourse, she "finished pulling my pants down and pulled one leg out of my pants." (R2735-38). While Hill and Harnish were in the bedroom and engaged in intercourse, Rogstad knocked on the door and asked, "Kay, are you all right?" (R2832) Harnish responded by stating, "Go away." (R2735-38; 2832). Harnish alleges that Hill physically overpowered her, and the intercourse was non-consensual. Hill alleges the intercourse was consensual. (R2316).

After the sexual encounter was completed, Harnish asked her friends, Rogstad and Majors, to take her to the hospital, claiming she had been raped by Hill. (R2569).

Her friends refused and instead took her to Cathy Thompson's house. (R2569-70). When they arrived at Thompson's house, Harnish refused to leave the car. (R2570). Thompson also refused to take Harnish to the hospital. (R2570-71). Her friends then left her in the car. (R2571-72). Harnish eventually exited the car and wandered the neighborhood for about thirty minutes before knocking on a stranger's door and asking her to call a cab. (R2573-74). Instead of a cab, two police officers showed up. (R2575-76). The police officers then took Harnish to Harris Hospital. (R2577). The hospital noted that Harnish had an "odor of alcohol on breath." (R2730).

The day after the alleged sexual assault, Harnish telephoned Hill and apologized for her conduct. (R2522-23).

Later in December 1995, Harnish consulted her personal attorney about the alleged sexual assault but did not mention it to AA. (R4622).

IV. Harnish's Subsequent Acts and Favorable Description of Her Relationship With Hill Prior to Her Receipt of Her June 24, 1996 Performance Evaluation.

After the alleged sexual assault, Harnish reported to work on her next scheduled workday. (R2334). In the immediately following weeks and months she did not report any alleged assault to AA. Nor did she file criminal charges against Hill (she did not do so until 1997). (R2579-80).

Prior to March 1996, Hill had not been Harnish's administrative manager and thus would not have been in the position to conduct her next performance evaluation or impose discipline. In March 1996, AA granted Harnish's bid to work in Hill's zone. (R2479-80). In March 1996, Hill became her administrative manager. (R3233).

By June 1996, Hill was scheduled to transfer to a job in another state. On June 16, 1996, Harnish gave a glowing description of her past and present working relationship with Hill. She wrote, "Its (sic) been a pleasure working with you this past year and a half! I'll miss you!" (R2699). As admitted at page 9 of her Petition, during non-duty hours, she also attended an off-premises going-away party for Hill not sponsored by AA.

Harnish admits to many performance deficiencies. She was relatively new to Ramp Services, and in terms of experience would have been behind most of the other 40 to 45 supervisors. She encountered a learning curve. She admittedly required "extensive coaching and counseling" concerning "how to perform her job." (R2509-10). Harnish had admittedly been counseled by her managers on numerous occasions concerning performance deficiencies. (R2484; 2460; 2485-86; 2461; 2482-83). Harnish further had developmental needs. (*Id.*). On June 23, 1996, the day before her June 1996 performance evaluation, she wrote, "I HAVEN'T SEEN ME WALKING ON WATER LATELY." (R2852). (caps orig.). Needless to say, before receiving the evaluation, Harnish did not expect it to be high. (R4261).

On June 24, 1996, Hill gave Harnish her evaluation. (R2506).

V. Harnish Complains That Her June 1996 Evaluation is an "INSULT" That Will "Ruin" Her Career, Alleges "EXTENSIVE SEXUAL ABUSE" That Has "GOTTEN WORSE," and Raises the Specter of a "CRIMINAL ACTION" That Will "NOT BENEFIT" AA.

On June 24, 1996, Harnish complained in writing to Mark Mitchell, Manager of Ramp Services. (R2705). She characterized her evaluation as an "INSULT." (R2705). (caps orig.)

On June 25, 1996, Harnish sent an e-mail to O'Hare. In it, Harnish (1) sought a personal appointment, (2) alleged "EXTENSIVE SEXUAL ABUSE ON THE DFW RAMP" that supposedly had "GOTTEN WORSE," and (3) raised the specter of a "CRIMINAL ACTION THAT WOULD NOT BENEFIT AMERICAN AIRLINES." (R2706). (caps orig.)

When Harnish met with O'Hare on or about June 28, 1996, she first complained to him about sexual harassment on the ramp in general. (R2517-18). She then complained about her evaluation, which she had not mentioned in her e-mail. (R2518). She claimed that her June 1996 evaluation was so poor it would "ruin" her career. (R4271-73). Lastly, she raised the issue of her alleged rape by Hill, her administrative manager who had conducted her performance evaluation. She said a rape investigation would be embarrassing to AA. (R2522).

VI. The Investigation Places Harnish's Trustworthiness in Doubt, and She Admits to Misrepresentations/Mischaracterizations, Ulterior Motive, and Material Omissions.

O'Hare asked AA's security department to perform an investigation. Numerous witnesses were interviewed and re-interviewed. Harnish has admitted to misrepresentations, mischaracterizations, material omissions, and ulterior motives.

A. Harnish Admits That as of June 1996, on the Ramp There Was Not "EXTENSIVE SEXUAL ABUSE," Much Less Extensive Sexual Abuse That Had "GOTTEN WORSE."

In her letter to O'Hare, Harnish had stated that "ON THE RAMP" there was "EXTENSIVE SEXUAL ABUSE" that had "GOTTEN WORSE." (R2706). In deposition, Harnish testified that in her mind, "SEXUAL ABUSE" is a

higher form of sexual harassment involving greater hostility, physical touching, and persistent unwelcome behavior. (R2430-31). This is the meaning she intended to convey to O'Hare in her e-mail. (R2513).

Harnish's representation was admittedly false. She testified that she was sexually harassed by four men – Mark Bowers, Mike Hill, Mike McKanna, and Bill Wilkshire. (R2534-35). The acts she attributes to Bowers, McKanna, and Wilkshire had ended before October 1995. (R2469-70; 2459; 2496-97; 2366). The only behavior by Hill (other than the intercourse, which certainly did not occur "ON THE RAMP") that Harnish alleged to constitute sexual harassment toward her was when, at a bar in October/November 1995, he sat close to or leaned into her and invited her to parties at his house. (R2563-65; 2315). Thus, Harnish's own testimony is that any alleged sexually harassing conduct had ended at least seven to eight months before her complaint to O'Hare. Harnish also admits that the jokes and language that she had allegedly found to be offensive back in 1995 had decreased, *i.e.*, conditions had improved on the ramp by June 1996. (R2512-13).

B. Harnish Admits to Misrepresentation/Mischaracterization of Her Performance Evaluation of June 1996.

Contrary to her written characterization, in deposition Harnish admitted that the evaluation was not an "INSULT." (R2705; 2506). Harnish's June 1996 evaluation was admittedly good and could not reasonably be construed as "ruining" a career or, as asserted on p. 26 of the Petition, "jeopardizing" a job. Harnish received a "3 – Fully Competent" rating, and her promotability was tracked as an "S." (R2703-04). Harnish was one of 40 to 45 ramp supervisors, and under AA's guidelines, two-thirds of them were to be rated "Fully Competent," which is

defined as "Solid Performance. Consistently Meets Expectations." (*Id.*; 2703-04; 4260). Under the "Competencies" section of the review, Harnish was rated as "Fully Competent" in seven categories and "Strong" in two categories. (*Id.*). Harnish was not rated below "Fully Competent" in any categories. (*Id.*). "S" is defined as "Capable of moving to a job with similar or expanded responsibilities within level." (*Id.*). Harnish occupied a level 3 position; there were no level 4 positions in Ramp Services, and she admits that the "S" rating would not prevent her from being considered for higher level positions outside Ramp Services. (R2822).

Harnish's June 1996 evaluation was better than her 1995 evaluation. It certainly had not "ruined" or "jeopardized" her career, but rather, had allowed her to transfer from an Admiral's Club position in San Diego to a position in Ramp Services at DFW. Remarkably, the performance deficiencies on her June 1996 evaluation mirrored those noted on her June 1995 evaluation concerning her work at the Admiral's Club in San Diego. Under the "managerial profiles" section of the review, which is intended to be "used when evaluating candidates for promotion," Harnish was rated as having only "average" skills in three areas, and as only "acceptable" in two, including "reaction to pressure" and "interpersonal skills." (R2639-44). The coaching and counseling section of Harnish's June 1995 review indicated that she "allowed her personal opinions/personality conflicts with specific individuals to get in the way of achieving the Corporate Objectives and ensuring total teamwork at a station level." (R2641-44). That section also indicated that Harnish needed improvement in "Dealing with discipline or uncomfortable situations without getting emotional." (Id.).

C. Harnish Admits to Facts Demonstrating an Ulterior Motive.

Hill had been selected for a position in another state. His shift manager was a level 5 position. Harnish's supervisor position was a level 3 position. There were no level 4 positions on the DFW ramp. Although she was relatively new to ramp operations, was one of 40 to 45 supervisors, and had less experience than most of the other supervisors, Harnish decided that she should be selected and allowed to skip level 4 and be promoted from her level 3 position into the level 5 position that Hill was scheduled to vacate. (R4620; 4258; 2512). While not impossible, skipping a level would have been very unusual, as would being selected over other supervisors with more skill. No one had told Harnish she was ready for a two-step promotion to shift manager. (R2505). Harnish felt she needed an unusually high evaluation as she embarked on her "QUEST FOR PROMOTION" to Hill's job. Harnish felt that her promotability needed to be tracked as a "P" (tracked for immediate promotion "today"). (R2703; 2507, 2516).

On June 24, 1996, when Harnish received her evaluation, she was dissatisfied, believing the evaluation would not enable her to achieve a two-step promotion into the position Hill was going to vacate. (R2515-16). Harnish then embarked on the following course of conduct.

Help Me in my "QUEST FOR A PROMOTION" or Face a "CONFRONTATION." On June 24, 1996, the day Harnish received her evaluation, she complained in writing. She wanted it increased. She indicated that if Mitchell did not assist her in her "QUEST FOR A PROMOTION," there would be a "CONFRONTATION" that would have an "ADVERSE EFFECT." (R2705). (caps orig.)

Threat of a "CRIMINAL ACTION" Because of Unhappiness With Performance Evaluation. On June 25,

1996, the first day after her evaluation, Harnish sent a document to O'Hare. She referred to work, to a police report, and wrote, "I DON'T BELIEVE THIS CRIMINAL ACTION WOULD BENEFIT AA." (R2705-06). (caps orig.) In deposition, Harnish dispositively admitted that her unhappiness with her performance rating was a reason that she raised the specter of a "CRIMINAL ACTION." (R4269).

Increase My Performance Rating Versus Facing Embarrassing Rape Investigation. On or about June 28, 1996, Harnish met with O'Hare. According to Harnish, she said her evaluation needed to be increased, and the next thing she said was that a rape investigation would be embarrassing to AA. (R2518 and 2522). It was not until June 28, 1996 – just days after her evaluation – that Harnish first reported to AA the alleged rape that had supposedly occurred over 200 days in the past. (R2321).

D. Harnish Admits Material Omissions.

At her meeting with O'Hare, Harnish said she had been raped by Hill. (R2519-21; 2724-34). However, at that meeting Harnish omitted significant facts that, when discovered, cast a different light on her original allegation. The omitted facts include: (1) drinking over an eight hour period and having been "bounced" on the grounds that she was drunk (R2546; 2529; 2552-53; 2557-59); (2) asking Hill if he wanted a "blow job" and unzipping his pants (R2737); (3) returning Hill's kisses (R2568), pulling her pants down and pulling one leg out (R2735-38), and during the act of intercourse, telling her best friend (Rogstad) to "Go away." (Id.); (4) in March 1996, requesting to be reassigned so she would be directly subordinate to the man who had allegedly raped her (R2479-80); (5) in June 1996, having written that working with Hill had been a "pleasure" (R2669-70) and attending an unofficial going-away party for Hill; (6) the day after the alleged

rape, calling Hill and apologizing; and (7) refusing to press criminal charges. (R2522-23).

E. The Investigation Otherwise Places Harnish's Trustworthiness in Doubt.

Harnish had depicted Hill as the aggressor. But Harnish's best friend, Rogstad, gave a written statement attesting that, in the car during the return trip from Cowboys, Harnish was teasing Hill and grabbing his crotch area. (R2841-42).

In his written statement, McKanna confirmed that, through an open door, he had seen Harnish and Hill engaged in the act of intercourse. Before he could leave, Harnish and Hill looked directly at McKanna. She had not cried for help. (R2848-49).

VII. The Decision to Discharge Harnish and Hill.

American's security presented its findings to O'Hare, Wallace, and Barbara Landers on June 23, 1996. (R2826-27). Wallace made the decision to terminate the employment of both Harnish and Hill. (R2827).[1]

With respect to Hill, he had been intimate with a subordinate employee and later had given a performance evaluation to her. (R4493). Thus he was discharged for having exercised poor judgment. (R2827).

With regard to Harnish, she was not discharged for the act of making a report or complaint. (R4492). Rather, in the work context, American necessarily and reasonably had to be able to rely on Harnish, a management employee, to report facts accurately and truthfully.

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[1] Hill signed an agreement that released all claims in exchange for payment of money under a pre-existing formula. Harnish refused to sign such an agreement.

(R4490-91). By any reasonable objective standard, Harnish had "mischaracterized" facts (R4491), misrepresented facts or did not tell the "truth" (R4492), made "serious omissions" (R4490), and acted with an "ulterior motive." (R4490). Therefore, Wallace concluded that American could no longer "trust" Harnish's "judgment as a supervisor." (R4490-92). Accordingly, AA terminated Harnish's employment on July 28, 1996 for the legitimate, non-discriminatory reason of exercising poor judgment. (Id.; R2739).

REASONS FOR DENYING WRIT

This is a garden variety Title VII discrimination/retaliation case in which summary judgment was correctly granted and affirmed. The actual facts of the case do not present the Court with any important legal issues. The Petition does not claim that the opinions of circuits are in conflict. Although the Petition inveighs against the procedural tool of summary judgment, this case does not call on the Court to add to existing summary judgment standards.

I. The Lower Courts Correctly Held That Harnish's Claims Based Upon Events Occurring on or Before October 4, 1995, are Barred by Limitations.

A Title VII plaintiff in a deferral state must file a charge of discrimination with the EEOC within 300 days after the occurrence of the unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1). Harnish filed her initial charge of discrimination on July 30, 1996. (R2811-12). Thus, she may only recover under Title VII for conduct that occurred after October 4, 1995.

Although the Petition (p. 29) uses the phrases "continuing violation"/"equitable tolling" and "equitable estoppel" interchangeably, these defenses are distinct.

Rhodes v. Guiberson Oil Tools, 927 F.2d 876, 878 (5th Cir.), *cert. denied*, 112 S.Ct. 198 (1991). Nonetheless, none apply to this case.[2]

A. Equitable Tolling/Continuing Violation.

"Equitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act." *Rhodes*, 927 F.2d at 878. If the plaintiff could not have, by the exercise of reasonable diligence, discovered essential facts giving rise to her claim, limitations will be tolled. *Id.* The same analytical approach applies to the so-called continuing violation theory. *Webb v. Cardiothoracic Surgery Assoc.*, 139 F.3d 532, 537 (5th Cir. 1998) (plaintiff's perception that conduct was offensive and sexual in nature "triggered [her] duty to assert her rights"); *Sabree v. United Brotherhood of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 402 (1st Cir. 1990) (where plaintiff admitted believing that he was being discriminated against at the time of the alleged discriminatory act, he had an obligation to file promptly or lose his claim); *Washington v. Occidental Chem. Corp.*, 24 F. Supp.2d 713, 724 (S.D. Tex. 1998) (plaintiff cannot assert ignorance of claim while having made numerous complaints concerning alleged harassment).

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[2] The petition suggests that *Nat. RR Passenger Corp v. Morgan*, No. 00-1614 (certiorari granted April 23, 2001) is somehow relevant to the case *sub judice*. The suggestion is misguided. The issue in that case is whether the time-barred claims are sufficiently related to claims not time-barred so as to allow the plaintiff to sue based on the time-barred claims. In contrast, in the case *sub judice*, the time-barred claims relate to Wilkshire, McKanna, and Bowers, whereas the claims not time-barred relate to Hill. The gap from October 1995 through June 1996 refutes any suggestion that the acts of Wilkshire, Bowers, and McKanna were continuing.

In the present case, Harnish admits that she knew of the sexually discriminatory nature of the alleged harassing conduct at the time it occurred and thought that it could affect her employment. (R2591-93). She also claims to have repeatedly complained about those alleged acts, and she consulted an attorney concerning her rights with respect to the alleged harassment. (R2318-19; 2453-55; 2578-79; 2593). Consequently, she cannot claim the benefit of equitable tolling/continuing violation. *Webb, supra*; and *Sabree, supra*.

Similarly, Harnish cannot claim the benefit of equitable tolling due to her emotional state following the alleged rape. First, Harnish did not present any expert testimony to the effect that she was mentally incapacitated. Her claim of mental incapacity relies solely upon inadmissible conclusory statements in her own self-serving affidavit to which objection was made below. Second, Harnish consulted an attorney in August 1995 and again in December 1995. (R2593; 4622). The fact that she retained counsel indicates that "her mental state did not prevent her from pursuing her legal rights under Title VII during the filing period." *Hood v. Sears Roebuck & Co.*, 168 F.3d 231, 233 (5th Cir. 1999); *accord Lopez v. Citibank, N.A.*, 808 F.2d 905, 907 (1st Cir. 1987).

B. Equitable Estoppel.

Equitable estoppel focuses on the employer's misconduct, not the employee's ignorance. *Rhodes*, 927 F.2d at 878. The doctrine requires that the employer affirmatively conceal or misrepresent facts, thereby causing an employee, in reliance, not to assert her rights within the limitations period. *Id.* at 878-79. The reliance must be reasonable. *See, e.g., Conaway v. Control Data Corp.*, 955 F.2d 358, 368 (5th Cir.), *cert. denied.*, 113 S.Ct. 186 (1992).

The only evidence submitted by Harnish in support of her contention that she was misled by American's

investigation is a statement in her affidavit that on September 19, 1995, when she filed her complaint concerning alleged harassment by Mark Bowers, "Personnel told [her] that their sexual harassment investigation would be completed in ten days. . . . " (R4623-24). However, this Court has expressly held that "the pendency of a grievance or some other method of collateral review does not toll the running of [Title VII] limitations period." *Delaware State College v. Ricks*, 449 U.S. 249, 261, 101 S.Ct. 498, 505-06 (1980). Moreover, to allow Harnish to obtain the advantage of equitable tolling or estoppel merely because she was given an expected time frame for the internal investigation would render Congress' mandate regarding the accrual of a cause of action meaningless in virtually every case where an internal investigation is performed.

In the absence of evidence that a threat was acted on or an affirmative act that prevented the filing of an EEOC charge, an employee's fear of possible retaliation is insufficient to invoke equitable estoppel. *See Jackson v. Entergy Ops., Inc.*, 1998 WL 101690 at * 6 (E.D. La. March 4, 1998), *aff'd*, 159 F.3d 1356 (5th Cir. 1998); *Gore v. Pee Dee Farm Credit Services*, 1992 WL 373129 at * 5 (D.S.C. October 15, 1992), *aff'd*, 1 F.3d 1233 (4th Cir. 1993). Harnish has not presented evidence that any threat was acted on[3] or that any affirmative act prevented her from filing a timely EEOC charge. Moreover, as the courts in *Jackson* and *Gore*

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[3] Although Harnish implies that the alleged sexual assault was somehow related to her prior complaints of harassment and was intended to prevent her from exercising her legal rights, there is absolutely no competent evidence to support this charge. Also, page 29 of the Petition refers to alleged "actual physical harm" for having filed an internal complaint. The assertion is speculative and conclusory and not supported by competent evidence.

recognized, Congress has provided employees, in circumstances such as those Harnish alleges, with an express remedy – a retaliation claim. *Jackson* at * 6; *Gore* at * 5. Accordingly, as with any equitable doctrine, the application of equitable estoppel is inappropriate where such a legal remedy exists.

II. The Lower Court Correctly Ruled That Harnish Did Not Establish a Viable Claim of Hostile Work Environment Sexual Harassment.

A. Because the Alleged Off-Premises, Off-Duty Sexual Assault of Harnish Cannot be Considered an Unlawful *Employment* Practice, it Cannot Form the Basis of a Title VII Claim Against American.

An alleged off-duty sexual assault, standing alone, cannot support an actionable Title VII claim. Title VII's proscriptions are limited to discrimination "with respect to [an employee's] compensation, terms, conditions, or privileges of employment. . . . " 42 U.S.C. § 2000e-2(a)(1). Thus, Title VII is violated when "the ***workplace*** is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. . . . " *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1993) (emphasis added) (internal quotations and cites omitted); *accord Oncale v. Sundower Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 1001 (1998). In *Oncale*, this Court stressed the limitation of Title VII to workplace conduct by using the word "workplace" no less than ten times.

Harnish's deposition testimony conclusively establishes that the events of December 3, 1995, were not employment related. To be with her friend Rogstad, Harnish went to Scoreboards, continued on to Hill's house,

went to Cowboys, and returned to Hill's house. (R2527; 2542-51; 2527; 2551; 2622-23; and 2622-23).

The only evidence connecting Harnish's employment and her presence at the bars and parties on December 3, 1995, is her own conclusory subjective statement that she "felt compelled to attend the day's social activities in order to maintain a good working relationship with her supervisors. . . . " (Pet. p. 26). Aside from her inadmissible statement in her affidavit that contradicts her deposition testimony,[4] Harnish fails to direct the Court to any objectively ascertainable acts by American supervisors that compelled her attendance.[5]

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[4] *See Wright, Miller & Kane,* Federal Practice and Procedure Civil 3d § 2726 at p. 452. ("It seems quite clearly correct to conclude that an interested witness who has given clear answers to unambiguous questions cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, without providing a satisfactory explanation of why the testimony is changed."). Before the lower courts, AA objected to this and other inadmissible evidence.

[5] Harnish attempts to create a misimpression by playing footloose with dates and titles. Relying on statements to the effect that Hill was one of her "administrative shift managers," Harnish asserts that he was a supervisor with immediate authority over her at the time of the alleged rape. (R4199). It is the administrative shift manager who prepares a supervisor's performance evaluation and can impose discipline. However, Harnish stipulated that Hill did not become her administrative shift manager until March 1996. (R3223). Consequently, by Harnish's own definition (*i.e.*, administrative shift manager), Hill was not her manager or supervisor as of December 3, 1995.

B. The 1996 Performance Evaluation and Occasional Non-Assignment of Temporary Tasks Do Not Remotely Establish Sexual Harassment Claims.

Harnish's speculation is not an adequate substitute for competent evidence from which a rational factfinder could reasonably infer that a causal nexus exists between the June 1996 evaluation and Harnish's rejection or acceptance of the alleged December 1995 assault. The June 1996 evaluation was not an act of a sexual nature. It bears no logical nexus to the earlier assault, and the disagreement between Hill and Harnish as to whether all relevant items had been completed does not magically transform the evaluation into something that it is not. Contrary to what the Petition argues, in deposition Harnish admitted that she did not expect a high evaluation. (R4261). The June 1996 evaluation was not poor. Rather, the rating was "Fully Competent" and her promotability was tracked as "S", both of which were good ratings in light of Harnish's many admitted deficiencies. (Counterstatement of Case § IV). The 1996 evaluation was as good or better than the 1995 evaluation and would have allowed Harnish to be promoted to the next level.[6]

Likewise, Harnish's speculation is not a substitute for evidence from which a rational factfinder could reasonably infer a causal nexus between the alleged December 1995 assault and the occasional non-assignment of Harnish to temporary tasks she preferred. The non-assignment was not a sexual act and bears no logical nexus to the alleged assault. Hill was Harnish's administrative

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[6] Since the 1996 evaluation was not poor and did not inflict "direct economic harm," it was not a tangible employment action. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 762, 118 S.Ct. 2257, 2269 (1998); and *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 373 n. 11 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 798 (1999).

shift manager for less than four months. Harnish was one of the least senior of 40 to 45 supervisors. Most task assignments were made based on seniority. (R4263 and 4337). There were nine or ten shift managers to make assignments. It is illogical to suggest that Hill could or should have pulled Harnish from regular supervisory tasks (that she was in the process of learning) and given her every other assignment she preferred, to the exclusion of other supervisors, especially ones more senior than Harnish.[7] Moreover, Harnish did not raise this issue in her EEOC charge despite the assistance of an attorney. (R2811-12; 2813-14; 2629). Thus, it may not form a basis for a Title VII suit. *Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir. 1993).

C. The Alleged Post-October 4, 1995 Sexual Acts are Not Severe or Pervasive Enough to Create an Objectively Hostile or Abusive Work Environment.

Title VII is not a general civility code for the workplace. *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 263 (5th Cir. 1999). "[I]t forbids only behavior so objectively offensive as to alter the conditions of the victim's employment." *Oncale*, 523 U.S. at 81. For conduct to alter the conditions of a person's employment, it must be so severe and pervasive that it creates an environment that a reasonable person would find hostile or abusive. *Harris*, 510 U.S. at 24.

Other than the alleged off-duty, off-premises sexual assault which is not employment related, the only post-October 4, 1995 alleged sexual acts consist solely of (1) in October/November 1995, Hill approached Harnish at a

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[7] The occasional non-assignment to temporary tasks Harnish preferred did not inflict direct economic harm and is not a tangible employment action. *Ellerth, supra*; and *Douglas, supra*.

bar, either sat close or leaned into her, and invited her and others to attend a party (and she declined the invitation) and (2) conclusory hearsay about the off-premises, off-duty overhearing unidentified co-workers tell some non-specific sex story about Hill. (R2563-64; 2315-16). As a matter of law, these conclusory, isolated incidents fall far short of the type of severe or pervasive and extreme conduct that may alter the terms and conditions of employment. *See, e.g., Cowan v. Prudential Ins. Co.*, 141 F.3d 751, 756, 758 (7th Cir. 1998) (incidents including occasional boasting of exploits at a strip club not severe or pervasive); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 823-26 (6th Cir.), *cert. denied*, 118 S.Ct. 172 (1997) (sexual comments, most of which were not directed at plaintiff, were not severe enough to create an objectively hostile environment).

D. Harnish Failed to Establish a Causal Nexus Between Her Acceptance/Rejection of the Alleged Assault and Her Discharge.

The only post-transfer tangible employment action was the discharge of Harnish. To establish a *prima facie* case, Harnish would have to show evidence supporting an inference of a causal nexus between her July 1996 discharge and her acceptance or rejection of the alleged assault of December 3, 1995. *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 (5th Cir. 2000).

The fact that American conducted an independent investigation into Harnish's claims, combined with the fact that Wallace made the decision to discharge both Harnish and Hill, conclusively disproves any alleged causal link between Harnish's discharge and her acceptance/rejection of the alleged assault of December 3, 1995. *See Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996).

III. The Lower Courts Correctly Ruled That Harnish Did Not Raise a Genuine Issue of Material Fact on Her Retaliation Claim.

To prove a *prima facie* case of retaliation, Harnish must show that: (1) she has engaged in activity protected by Title VII; (2) AA took an adverse employment action against her; and (3) a causal connection exists between the protected activity and the adverse employment action. *See Burger v. Central Apartment Management, Inc.*, 168 F.3d 875, 878 (5th Cir. 1999). If Harnish succeeds in proving a *prima facie* case, the burden of going forward shifts to AA to provide a non-retaliatory explanation for the adverse employment action. *See Long*, 88 F.3d at 305. Once AA shows a neutral, non-retaliatory reason for its actions, it is Harnish's burden of proof to demonstrate pretext, *i.e.*, that ultimately she would not have suffered the adverse employment action but for her protected conduct. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08, 113 S.Ct. 2742, 2747-48 (1993); *see Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106 (2000); and *Long*, 88 F.3d at 305 n.4, 308; *Douglas*, 144 F.3d at 372.

The first element of the *prima facie* case, protected activity, can arise under the "participation" or the "opposition" clause of 42 U.S.C. § 2000e-3(a). The scope of the "participation" clause protects one who has made a charge, testified, assisted, or participates in "an investigation, proceeding or hearing under this subchapter." *Id.* The participation clause affords extraordinarily broad protection to persons who participate in an administrative or judicial Title VII proceeding. *Pettway v. Am. Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n. 18 (5th Cir. 1969). However, prior to her discharge, Harnish had not participated in any Title VII administrative or judicial proceeding. Thus, she cannot invoke the participation clause.

The scope of the opposition clause is limited to opposition to unlawful *employment* practices. 42 U.S.C. § 2000e-3. While the practice opposed need not be found

ultimately unlawful, the opposition clause does not protect unwarranted, unreasonable, or bad faith statements. The employee must have had an objective and reasonable belief that the act opposed violated Title VII. Recently, the Court accepted without deciding this standard. *See Clark County School District v. Breeden*, 121 S.Ct. 1508, 1510 (2001). *See Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000); *Wilson v. UT Health Center*, 973 F.2d 1263, 1268 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1644 (1993) (knowingly false charges, not in the context of an EEOC charge, are not protected by the opposition clause); *Volberg v. Pataki*, 917 F. Supp. 909, 914-15 (N.D.N.Y.), *aff'd.*, 112 F.3d 507 (2nd Cir. 1996), *cert. denied*, 117 S.Ct. 1252 (1997) (employee's belief could not have been held in good faith, where he knew that his layoff had resulted from employer's seniority system). Harnish filed an intra-company complaint in June 1996 and can claim protection only under the opposition clause.[8]

A. Harnish Did Not Establish a *Prima Facie* Case Because Her Complaints to O'Hare Were Not a Protected Activity Under the Opposition Clause of Title VII.

It is Harnish's burden to demonstrate that the following were employment practices and that she had an objective and reasonable belief that the acts about which she complained were both unlawful and employment practices: 1) "EXTENSIVE SEXUAL ABUSE" on the ramp that supposedly was "GETTING WORSE;" 2) her 1996 evaluation was an "INSULT" and was so poor that it

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[8] Pages 22-24 of Harnish's Petition confuse the fundamental distinction between the opposition clause and the participation clause. She refers to both clauses. She relies upon cases that are inapposite because they were not decided under the opposition clause.

would "ruin" her career; and 3) the alleged off-duty, off-premises rape by Hill.

1. The Complaint About "EXTENSIVE SEXUAL ABUSE" That Had "GOTTEN WORSE" Was Not Protected Because Harnish Admits it Lacked an Objective and Reasonable Basis.

In deposition, Harnish admitted facts establishing the falsity of her June 1996 complaint that there was "EXTENSIVE SEXUAL ABUSE ON THE RAMP" and that it had "GOTTEN WORSE." (R2706). Counterstatement of Case § VI.A. The record contains no evidence explaining how Harnish's admittedly false accusation could have been objective and reasonable. *See, e.g., Byers,* 209 F.3d at 428-29 (analyzing factual basis of numerous complaints of race discrimination and holding none were objective and reasonable); *Bradley v. CMI Indus., Inc.,* 17 F. Supp.2d 491, 497 (W.D.N.C. 1998) (falsity of plaintiff's complaint demonstrates unreasonableness of purported belief that sexual harassment had occurred).

2. The Complaint About the June 1996 Performance Review Was Not Protected Because it Lacked an Objective and Reasonable Basis.

Although Harnish complained that her evaluation was an "INSULT" (R2705), in deposition she admitted it was not an insult. (R2506). No reasonable person could have objectively concluded that the evaluation was so poor it would "ruin" her career and "jeopardize" her job. Counterstatement of Case § VI.B. Since a "fully satisfactory" rating cannot be retaliatory as a matter of law, Harnish could not have had an objective and reasonable belief that it was in fact retaliatory. *See Douglas,* 144 F.3d at 373 n. 11. Nor did Harnish have an objective and reasonable belief that an "S" tracking would "ruin" her career and "jeopardize" her job. The tracking addresses

promotability, not retention/nonretention. She admits that she could be promoted with an "S" tracking. Given her relative inexperience in Ramp Services and many performance deficiencies (Counterstatement of Case § IV), "S" was a good rating.

3. The Complaint About the Alleged Sexual Assault Was Not Protected Because it Was Not Employment-Related and Also Because it Was Used for Ulterior Motive.

"Opposition" is not protected unless it addresses an employment practice within the scope of Title VII. *See Sarff v. Continental Express*, 894 F. Supp. 1076, 1082 (S.D. Tex. 1995), *aff'd*, 85 F.3d 624 (5th Cir. 1996) (plaintiff's opposition to discrimination based on sexual orientation was not protected by Title VII because the conduct complained of was not the type of conduct proscribed by Title VII); *Harvey v. Chevron U.S.A., Inc.*, 961 F. Supp. 1017, 1033 (S.D. Tex. 1997) (finding that complaint about favoritism to a paramour is not a protected activity).

In the present case, in deposition, Harnish admitted facts conclusively proving the alleged off-duty, off-premises sexual assault of December 1995 was not employment-related. Counterstatement of Case § III. Thus, it was not protected and cannot be the basis for a retaliation claim. Moreover, Harnish admitted that a reason she brought up the alleged assault was the ulterior motive that she was unhappy with her evaluation and wanted it increased. However, as explained above, her complaint about her evaluation was not objective and reasonable.

B. Assuming That Harnish has Established a *Prima Facie* Case of Retaliation, Then She Failed to Establish Pretext.

1. Harnish's Employment was Terminated For a Legitimate, Non-Retaliatory Reason.

The discharge of an employee for making misrepresentations, even if during the course of a sexual harassment investigation instigated by the employee, is legitimate and non-retaliatory. *See Wilson*, 973 F.2d at 1267 (affirming judgment of district court that concluded that employee's misrepresentations, not her reports of sexual harassment, caused her termination); *see also Vasconcelos v. Meese*, 907 F.2d 111, 112 (9th Cir. 1990) (employer had a legitimate, non-discriminatory reason for terminating employee who lied about involuntary nature of complained of sexual encounter with her supervisor).

As documented in Counterstatement of the Case § IV.A., Harnish admitted that her June 1996 claim about "EXTENSIVE SEXUAL ABUSE" that had "GOTTEN WORSE" was a misrepresentation. Contrary to her assertion, her 1996 evaluation could not reasonably be construed as being so poor it would "ruin" her career. Harnish admitted the falsity of her assertion that the evaluation was an "INSULT." *See* Counterstatement of Case § VI.B. She admitted a reason she had raised the specter of a "CRIMINAL ACTION" was the ulterior motive that she was unhappy with her June 1996 performance evaluation and wanted it increased. As a level 3 supervisor and despite many admitted performance deficiencies, she was on a "QUEST FOR PROMOTION" and wanted to skip level 4 and move into the level 5 position Hill was vacating. *See* Counterstatement of Case § VI.C.

When Harnish made the rape allegation to O'Hare on June 28, 1996, she had waited well over six months before bringing it up and admits that a reason she brought up the allegations was because she wanted her performance evaluation increased. When speaking to O'Hare, she did

not mention any of the events that, once learned, cast a different light on the rape allegation. (Counterstatement of Case §§ VI.C. and D.).

Other witnesses cast suspicion on Harnish's truthfulness. *See* Counterstatement of Case § VI.E.

Following the investigation, Wallace made the decision to terminate the employment of both Hill and Harnish. With respect to Harnish, Wallace reached the good faith reasonable belief that he could no longer trust and rely on her judgment – as a member of management – to report facts accurately and truthfully. She was thus discharged for "poor judgment." *See* Counterstatement of Case § VII.

2. Harnish Failed to Sustain Her Burden to Establish Pretext.

The *Reeves* opinion clarified the burden shifting framework. "[T]he *prima facie* case, combined with sufficient evidence that the employer's asserted justification is false, ***may*** permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 120 S.Ct. at 2109 (emphasis added). However, "This is not to say that such a showing by the plaintiff will ***always*** be adequate to sustain a jury's finding of liability." *Id.* (emphasis orig.). Factors to examine "include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered. . . . " *Id.*

In *Reeves*, this Court examined whether the *prima facie* case and evidence of pretext were strong or weak. *Id.* at 2107-09. Reeves established a strong *prima facie* case. The supervisor who had made the actual discharge decision had made many comments demonstrating clear age animus. *Id.* at 2111. Reeves also made a strong showing that the employer's reason for discharge was false. One reason for the plaintiff's discharge was not properly

maintaining records which caused employees to be paid for hours not worked, but the plaintiff had actually been in the hospital during the timeframe in question. *Id.* at 2107. Another reason for the plaintiff's discharge was failing to discipline tardy employees, but it was not the plaintiff's job to discipline tardy employees. (*Id.*).

As the *Reeves* opinion states, the probative evidence of falsity must be examined in light of all evidence that supports the employer's reason for discharge. In some cases, as in *Reeves*, the probative value of falsity may be strong. In other cases, the probative value may be weak and not sufficient to avoid summary judgment. *Id.* at 2109. For example, following an internal investigation, there is no retaliation when circumstances "give the employer good reason to believe that the fictitious version was the result of knowingly false statements. . . . " *EEOC v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000). The complainant's mere subjective opinion that he/she did not make misrepresentations and that an employer should have reached a different conclusion is not sufficient to create a fact issue that will avoid summary judgment. *Id.; Jasmantus v. Subaru-Isuzu Automotive, Inc.*, 139 F.3d 1155, 1157 (7th Cir. 1998); and *Wilson*, 973 F.3d at 1268. Indeed, since the employer's motive is the ultimate issue, even an incorrect but good faith belief does not necessarily establish pretext. *Little v. Republic Refining Co. Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991).

Here, Harnish's reliance on *Reeves* is misguided. In deposition, Harnish admitted facts substantiating Wallace's conclusion. She admitted to multiple misrepresentations and mischaracterizations (Counterstatement of the Case § VI.A. and B.); she admitted facts demonstrating her ulterior motive (*Id.* § VI.C.); and she admitted many material omissions (*Id.* § VI.D.). Hence, as a result of her own testimony, Harnish failed to establish the falsity of Wallace's conclusion that he disbelieved and could not trust her.

Ignoring her overwhelming and dispositive admissions, the Petition latches onto an isolated point and argues that Wallace's decision not to credit Harnish's rape allegation entitles her to a jury trial. This argument misses the mark. First, against the overall background of her damning admissions, the one isolated point does not rise to the level of "a substantial showing" that Wallace's conclusion – that he did not trust Harnish – was false. *Reeves*, 120 S.Ct. at 2107. Second, Harnish does not argue that facts supporting Wallace's conclusion are false. To the contrary, she admits that she omitted material facts, that she acted with ulterior motive, and that she made misrepresentations and mischaracterizations. Based on Harnish's admissions, which conclusively reveal non-discriminatory reasons for her discharge and demonstrate the extreme weakness of her evidence of pretext, AA is entitled to judgment as a matter of law. *Reeves*, 120 S.Ct. at 2109. Third, Harnish does not present evidence questioning the good faith nature of Wallace's conclusion. Unlike the facts in *Reeves, supra*, where the actual decision-maker had made multiple discriminatory remarks, here there is no evidence that Wallace made discriminatory or retaliatory remarks. Hence, any *prima facie* case that Harnish might arguably establish is too weak to enable her to avoid summary judgment. *Reeves*, 120 S.Ct. at 2111.

Harnish's other argument also lacks merit. Wallace testified that Harnish was discharged for demonstrating poor judgment as a supervisor because of her misrepresentations, mischaracterizations, ulterior motives, and omissions. (R2823-25). Harnish asserts this is inconsistent with a statement in an EEOC filing stating that Harnish demonstrated poor judgment by engaging in oral sex in public. Based on a misunderstanding and misapplication of *Reeves*, Harnish argues that this is sufficient evidence of falsity to entitle her to avoid summary judgment. This argument also misses the mark. First, *Reeves* spoke of "a

substantial showing" the employer's reasons are false. *Reeves*, 120 S.Ct. at 2107. Neither the reason given in Wallace's deposition, nor that asserted in the EEOC response, is inconsistent with the reason stated in the discharge letter given to Harnish. (R2739). Thus, at most, her evidence of falsity is the slight circumstantial evidence that the two subsequent explanations, although consistent with the original stated reason, are somewhat inconsistent. Slight circumstantial evidence is not a "substantial showing." *Reeves*, 120 S.Ct. at 2107.

Second, and dispositively, *Reeves* explicitly recognized that in some cases there may be some evidence of falsity but in light of other evidence "no rational factfinder could conclude that the action was discriminatory." *Reeves*, 120 S.Ct. at 2109. Here, assuming that the EEOC response is some evidence of falsity, other evidence conclusively establishes the absence of retaliation. Specifically, Harnish's own deposition admissions (to misrepresentations, mischaracterizations, ulterior motive, and significant omissions) are "abundant and uncontroverted evidence" that establish the absence of retaliation. *Id.*

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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